Subramaniam a/l Arumugam v Public Prosecutor

FEDERAL COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-44 OF 1991

EUSOFF CHIN CHIEF JUSTICE, LAMIN PCA, WAN ADNAN CJ (MALAYA), MOHAMED DZAIDDIN AND ZAKARIA YATIM FCJJ

28 FEBRUARY 2000

Criminal Law *— Trafficking in dangerous drugs — Chemist failed to testify — Chemist's report failed to state 's 2' — Chemist report failed to mention tests conducted and result of any physical examination on drugs — Effect of failure to state 's 2' in report — Whether chemist was referring to cannabis under s 2 of Dangerous Drugs Act 1952 or cannabis (Indian Hemp) under First Schedule — Guidelines in dealing with chemist's report — Dangerous Drugs Act 1952 ss 2 & 39B(1)(a)*

Criminal Law *— Statutory presumption of trafficking — Failure of trial judge to adopt 'Radhi direction' — Trial judge convicted accused for trafficking without considering whether statutory presumption of trafficking rebutted — Whether trial judge misdirected himself — Dangerous Drugs Act 1952 s 37(d) & (da)*

The appellant was convicted in the High Court at Kuala Lumpur on 6 April 1991 for trafficking in 236.07g of cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). He was accordingly sentenced to death and appealed. His appeal before the Federal Court was argued on three grounds, namely: (i) that the trial judge had applied the wrong test when he concluded that the prosecution at the close of its case had established a prima facie case against the appellant; (ii) that the omission to state the words 's 2' of the Act in the chemist report ('P19') had given rise to an inference of a probability that the substance which the chemist had analyzed was Indian Hemp; and (iii) the trial judge had erred in failing to consider whether the defence had rebutted the statutory presumption of trafficking under s 37(da) of the Act. The chemist did not give any evidence at the trial and his report (P19) made no mention of the tests conducted and the result of the physical examination, if any.

Held, allowing the appeal, quashing the conviction and setting aside the death sentence but substituting a conviction under s 6 of the Act and sentencing the appellant to 12 years' imprisonment under s 39A(2) from the date of arrest plus whipping of ten strokes:

(1) Although it was noted that the trial judge had applied the prima facie test in calling upon the appellant to enter his defence when at that material time the standard of proof was the 'beyond reasonable doubt' test, what was put forward by counsel was not so much whether the learned judge had misdirected himself on the standard of proof but whether the Court of Appeal decision in *Lt Kol Yusof bin Abdul Rahman v Kol Anuar bin Md Amin & Anor* [1997] 1 MLJ 562 was correct in holding that the degree of proof required to establish a prima facie case is proof beyond reasonable doubt. It was thus unnecessary for the court to express its view on the point (see p 199D–G).

(2) So long as the chemist testifies or certifies that the plant material which he analyzed contained the ingredients of cannabis under the Act, it does not matter whether or not he mentions 's 2' of the Act. When the chemist says that based on his analysis the cannabis is as defined in the Act, the chemist must have in mind only cannabis defined in s 2 since Indian Hemp is nowhere defined in the Act. If the testimony of the chemist satisfies the essential ingredients of the statutory definition of 'cannabis' under the Act, the mere omission to mention the words 's 2' would not be material and should not affect his expert opinion (see p 202F–H).

(3) The trial judge had misdirected himself by failing to consider as a separate exercise whether the defence had on a balance of probabilities succeeded in rebutting the statutory presumption of trafficking under s 37(da) of the Act. The appeal was allowed on this ground alone (see p 199B–C).

[Bahasa Malaysia summary

Perayu telah disabitkan di Mahkamah Tinggi Kuala Lumpur pada 6 April 1991 untuk mengedar 236.07 grams kanabis di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut'). Beliau kemudiannya dihukum mati dan merayu. Rayuannya ke Mahkamah Persekutuan adalah berdasarkan tiga hujahan, iaitu: (i) bahawa hakim perbicaraan telah menerima pakai ujian yang salah apabila beliau menyimpulkan bahawa di akhir kes pendakwaan suatu kes prima facie telah diwujudkan terhadap perayu; (ii) bahawa ketinggalan untuk menyatakan perkataan-perkataan 's 2' Akta tersebut di dalam laporan ahli kimia ('P19') telah membangkitkan kemungkinan inferens bahawa bahan yang dianalisakan oleh ahli kimia adalah Indian Hemp; dan (iii) hakim perbicaraan telah silap kerana gagal untuk mempertimbangkan sama ada pembelaan telah mematahkan anggapan mengedar di bawah s 37(da) Akta tersebut. Ahli kimia tidak memberikan sebarang keterangan semasa perbicaraan dan laporannya (P19) tidak menyatakan apa-apa mengenai ujian yang dijalankan dan hasil pemeriksaan, jika ada.

Diputuskan, membenarkan rayuan tersebut, membatalkan sabitan tersebut dan mengetepikan hukuman mati tetapi menggantikan sabitan di bawah s 6 Akta tersebut dan menghukum perayu untuk 12 tahun penjara di bawah s 39A(2) dari tarikh penahanan dengan sepuluh sebatan:

(1) Walaupun adalah diperlihatkan bahawa hakim membicara telah memakai ujian prima facie di dalam memanggil perayu untuk memasuki pembelaannya apabila pada masa matan standard membukti adalah ujian 'melampaui keraguan munsabah', apa yang dibentangkan oleh peguam bukanlah sama ada hakim telah

tersalah arah di atas standard membukti tetapi sama ada keputusan Mahkamah Rayuan di dalam *Lt Kol Yusof bin Abdul Rahman v Kol Anuar bin Md Amin & Anor* [1997] 1 MLJ 562 adalah betul di dalam memutuskan bahawa beban membukti yang diperlukan untuk mewujudkan suatu kes prima facie adalah melampaui keraguan munasabah. Adalah tidak perlu bagi mahkamah untuk meluahkan pendapatnya mengenai perkara tersebut (lihat ms 199D–G).

(2) Selagi ahli kimia memberikan keterangan atau mengesahkan bahawa bahan tumbuhan yang dianalisakannya mengandungi bahan-bahan kanabis di bawah Akta tersebut, adalah tidak perlu untuk beliau mengatakan mengenai 's 2' Akta tersebut. Apabila ahli kimia mengatakan bahawa berdasarkan analisanya kanabis adalah seperti yang yang didefinasikan dalam s 2 oleh kerana Indian Hemp tidak didefinasikan di dalam Akta. Jika keterangan ahli kimia memuaskan bahan-bahan yang perlu di dalam definasi statutori kanabis di bawah Akta tersebut, ketinggalan semata-mata untuk menyatakan perkataan-perkataan 's 2' tidaklah penting dan tidak patut menjejaskan pendapat pakarnya (lihat ms 202F–H).

(3) Hakim yang membicara telah tersalah arah dirinya kerana gagal untuk mempertimbangkan sebagai suatu latihan yang berasingan sama ada pembelaan di atas imbangan kebarangkalian berjaya mematahkan anggapan statutori mengedar di bawah s 37(da) Akta tersebut. Rayuan tersebut dibenarkan di atas dasar ini sahaja (lihat ms 199B–C).]

Notes

For cases on presumption under s 37(da) of the Dangerous Drugs Act 1952 generally, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 49–66.

For cases on trafficking generally, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 83–228.

Cases referred to

Abdul Karim bin Pak Kub & Anor v PP [1997] 2 MLJ 112 (refd)
Abdullah bin Yaacob v PP [1991] 2 MLJ 237 (refd)
Arulpragasan a/l Sandaraju v PP [1997] 1 MLJ 1 (refd)
Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265 (refd)
Lt Kol Yusof bin Abdul Rahman v Kol Anuar bin Md Amin & Anor [1997] 1 MLJ 562 (folld)
Mohamad Radhi bin Yaacob v PP [1991] 3 MLJ 169 (refd)
Mohd Yusof bin Said v PP [1996] 1 MLJ 640 (refd)
PP v Alcontara [1993] 3 MLJ 568 (refd)
PP v Ong Cheng Heong [1998] 6 MLJ 678 (refd)
Shukri bin Mohamad v PP [1995] 3 MLJ 229 (refd)

Legislation referred to

Court of Judicature Act 1964 s 92(1)
Criminal Procedure Code ss 173(f), 180, 399
Dangerous Drugs Act 1952 ss 2, 6, 12(2), 37(d), 37(da), 39A(2), 39B(1)(a), 39B(2), First Schedule Part III

Appeal from: Criminal Trial No 47–3 of 1991 (High Court, Kuala Lumpur)

Karpal Singh (*Jagdeep Singh Deo* with him) (*Karpal Singh & Co*) for the appellant
Mohd Zaki bin Md Yasin (Deputy Public Prosecutor) for the respondent.

Mohamed Dzaiddin FCJ (delivering judgment of the court): This was an appeal from the judgment of the High Court Kuala Lumpur on 6 April 1991 which convicted the appellant for trafficking in 236.07 grams of cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') on 8 September 1988 at a roadblock at Jalan Robson, off Jalan Syed Putra, Kuala Lumpur. The appellant was sentenced to death under sub-s (2) of s 39B of the Act.

We heard the appeal on 13 July 1999 specially to consider whether the omission to state s 2 of the Act in the chemist's evidence or in his report has excluded the probability that the substance he has analysed was 'cannabis (Indian Hemp)', a drug listed in Part III of the First Schedule of the Act as a result of *Shukri bin Mohamad v PP* [1995] 3 MLJ 229.

Background

The prosecution evidence was as follows. On 8 September 1988 at about 2.15pm during the course of a routine roadblock at Jalan Robson, off Jalan Syed Putra, Kuala Lumpur, PC Kamarnor bin Abdullah (PW2) stopped the appellant and his pillion, one Periannan a/l Pichay who were on motorcycle BCN 5947. There were five other policemen at the scene. The appellant was asked for his driving licence which he could not produce. The appellant however produced his identity card (exh P4) from his wallet which he took out from his trouser pocket. The appellant's name according to the identity card was ascertained to be Balakrishna a/l Thanimalal. While checking the road tax of the motorcycle, PW2 noticed a red plastic bag (exh P7) in the carrier-basket. He told the appellant to take the bag out and to open it. On the appellant opening the plastic bag, PW2 noticed a newspaper package (exh P8) inside P7. The appellant opened this package which had another newspaper package (exh P9). This latter package contained a number of rolls of yellow paper tied up in bundles (exhs P10A–Q) which were suspected to be cannabis. These exhibits were shown to PC Ahmad bin Mohd Saman and Corporal Hapidz bin Ahmad (PW3) in the presence of the appellant.

The appellant was told to rewrap the package and to place it back in the plastic bag. PW2 then arrested the appellant and Periannan on the instructions of PW3 who took possession of the plastic bag. The appellant and Periannan were taken to the Brickfields police station, where PW2

counted the bundles of rolls of suspected cannabis in the presence of the appellant and Periannan. There were 16 bundles of 50 rolls each and one bundle of 30 rolls, making a total of 830 of suspected cannabis. PW2 then lodged a police report.

At about 5.10pm on the same day, PW2 handed over the appellant, Periannan, and all the exhibits which he had seized, to Inspector Hassan Jalaludin bin Abdul Malik (PW7) of the Cawangan Anti Dadah, Contingent Police Headquarters, Kuala Lumpur, who later became the investigating officer of the case.

PW7 testified that he received the exhibits pertaining to the case from PW2 and kept them in safe custody. On 8 September 1988, he took the suspected cannabis to the Chemistry Department Petaling Jaya and handed it to the Government Chemist, En Cheong Meow Koon for analysis. He received the package back on 12 January 1989 with a copy of the chemist's report (exh P19). On 5 February 1991, he served a copy of the report on the appellant.

The chemist, En Cheong Meow Koon, did not testify in court. However, his report (exh P19) under s 399 of the Criminal Procedure Code ('the CPC') was tendered at the trial. It reads as follows:

> I found in package 'A' a plastic bag in which was a newspaper package containing 830 paper rolls in 17 bundles each tied with a rubber band. The 830 paper rolls contained a total of 236.07g (nett) of dried plant material which on analysis, I found to be 'cannabis'.
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> *'Cannabis' is as defined in the Dangerous Drugs Act 1952.* During analysis, all the above plant material had been removed from the paper rolls and the balance after analysis was sealed in a plastic packet marked with the above Laboratory Number. (Emphasis added.)

At the close of the prosecution case, the learned judge held as follows (p 100 rekod rayuan):

> I found that the prosecution had established a prima facie case against the accused and called on him to enter upon his defence. The presumption under s 37(d) of the Act was applicable in his case as the accused was, according to credible evidence up to the close of the case for the prosecution, found to have had in his custody and under his control the plastic bag which contained the cannabis, which was the subject matter of the charge. He was therefore deemed to have been in possession of the cannabis and deemed to have known its nature. The onus shifted to the accused to prove the contrary on the balance of probabilities.

The defence

The appellant elected to make a statement from the dock. He stated that on 8 September 1988 at about 8am he went to General Hospital Kuala Lumpur with a friend named Maruthamuthu on the latter's motorcycle to visit a relative. After being told that the relative was not in the hospital, he borrowed Muthu's motorcycle to go to Brickfields. On the way, he met Periannan at a bus stop and invited him to go to a toddy shop for a drink. At about 1.30pm, they proceeded towards Jalan Robson. They stopped at a police roadblock. He noticed there were about ten motorcycles ahead of

him waiting to be checked by the police. He stopped the motorcycle near a drain. At first, PW2 did not ask him anything. But, he took a plastic bag which was by the side of the drain and asked him 'Beg ini siapa punya? (Whose bag is this?)' after that PW2 asked him for his identity card and driving licence. He informed PW2 that he did not have a driving licence and had lost his identity card. He also informed PW2 that the bag was not his. PW2 then opened the bag and examined it after which he asked him further, 'Ganja ini siapa punya? (Whose cannabis is this?)'. The appellant replied he did not know. Both he and Periannan were arrested and brought to Brickfields police station. The appellant denied that he ever handled the plastic bag which was shown to him by PW2.

In essence, the appellant's defence was a complete denial of any knowledge about the cannabis in the red plastic bag (P7).

At the close of the defence, the learned judge made the following finding (p 115 rekod rayuan):

> I concluded from the evidence that the accused was caught redhanded with the cannabis and he only made a feeble attempt to show otherwise through his statement from the dock. The story he told was not credible in the circumstances and I found that he had failed to discharge the onus which lay upon him to rebut the case for the prosecution on a balance of probabilities. He was therefore found guilty and convicted as charged.

The appeal

Before us, the appeal was argued on three grounds. First, En Karpal submitted that the trial judge had applied the wrong test when he concluded that the prosecution at the close of its case had established a prima facie case against the appellant, when the standard of proof at the material time was beyond reasonable doubt (*Khoo Hi Chiang v PP and another appeal* [1994] 1 MLJ 265). Counsel referred us to a number of relevant authorities on the meaning of 'prima facie' which established that 'prima facie' cannot mean 'beyond reasonable doubt'. In the circumstances, he contended that this was a material misdirection by the trial judge which could not be cured by the court invoking the proviso to s 92(1) of the Court of Judicature Act 1964.

Secondly, counsel submitted that the omission to state the words 's 2' of the Act in the chemist report (P19) had given rise to an inference of a probability that the substance which the chemist had analysed was cannabis (Indian Hemp) in view of *Shukri*. Counsel pointed out that the statement in P19 was worse than what the chemist in *Shukri* has testified. First, the chemist did not give evidence. Secondly, P19 made no mention of the tests conducted and the result of the physical examination, if any. In the circumstances, following the appellant was entitled to a benefit of the doubt as the inference would be that he had committed an offence in a lower degree of seriousness ie for possession of Indian Hemp, where a finding on a higher degree ie cannabis, would merit a death sentence. We shall discuss the effect of *Shukri* shortly.

The third ground was the failure of the trial judge to follow *Mohamad Radhi bin Yaacob v PP* [1991] 3 MLJ 169 when he convicted the appellant for trafficking without addressing his mind on the question whether the

defence had rebutted the statutory presumption of trafficking under s 37(da) of the Act. En Karpal referred us to the grounds of judgment of the trial judge which he contended dealt only on the statutory presumption under s 37(d) of the Act without adverting to the presumption under s 37(da) of the Act. On this point, Dato' Mohd Zaki, TPR agreed that the trial judge based the conviction for trafficking on the failure of the appellant to rebut the presumption of possession under s 37(d) of the Act without considering s 37(da) of the Act.

After considering the evidence and the conclusion of the learned trial judge, we found that his Lordship had misdirected himself in failing to adopt *Mohamad Radhi* in considering whether on the balance of probabilities the evidence of the defence had rebutted the statutory presumption under s 37(da) of the Act, although he found that the appellant had custody and control of the red plastic bag and therefore deemed to be in possession of the drug. Accordingly, we allowed the appeal on this ground, quashed the conviction, set aside the death sentence and substituted a conviction under s 6 and sentenced the appellant to 12 years imprisonment under s 39A(2) of the Act to take effect from the date of arrest and whipping of ten strokes.

We indicated that we would give our reasons in due course which we do so now.

On the first ground, we note that the trial judge applied the prima facie test when calling upon the appellant to make his defence, although at the material time the standard of proof was not the 'prima facie' test, but 'beyond reasonable doubt' test, following *Khoo Hi Chiang* and *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1 (majority decision). However, what was put forward to this court by counsel was not so much whether the learned judge had misdirected himself on the standard of proof, but whether the Court of Appeal decision in *Lt Kol Yusof bin Abdul Rahman v Kol Anuar bin Md Amin & Anor* [1997] 1 MLJ 562, a case decided prior to the amendment of ss 173(f) and 180 CPC vide Act A979, was correct in holding that the degree of proof required to establish a prima facie case is proof beyond all reasonable doubt. In view of a latter decision of the Kangar High Court in *PP v Ong Cheng Heong* [1998] 6 MLJ 678, which distinguished and disagreed with *Lt Kol Yusof*, we were therefore urged to give a ruling on *Lt Kol Yusof*.

We think for the moment it is unnecessary for us to express our view on the point, nor do we want to enter into an intellectual discourse on the meaning of the words 'prima facie'. Also, in fairness to the learned Mr Deputy, he would require more time to 'get up' the authorities to respond to counsel's argument.

With respect to the second ground, which is the heart of the appeal, we are satisfied that the chemist report (P19) made no mention of the words 's 2'. In addition, it did not mention whether the analysis was based on the microscopic examination and the basic tests using chemical methods eg the Dequenois Levine and the Thin Layer Chromatography tests. It also made no mention of the result of his physical examination of the plant material. We can safely conclude that P19 suffered from the same defects or infirmities which were recognized in *Shukri*.

In *Shukri*, the point taken at the appellate stage was that the trial judge was wrong in relying on the evidence of the chemist SP9, which evidence had created a doubt as to whether the substance he had analyzed was 'cannabis' within the meaning of s 2 of the Act or 'cannabis (Indian Hemp)', a drug listed in Part III of the First Schedule of the Act. The Federal Court of three members analysed the evidence as follows:

> A scrutiny of the record provided shows that, in essence, all the chemist had said on the point at issue was that the result of his examination and analysis of the various quantities of plant material which constituted the subject matter of the charge aforesaid, showed that in each case it was 'Cannabis as defined in the Dangerous Drugs Act 1952'. The aggregate net weight of the cannabis being 25,664.8g. The judge's notes of evidence shows that there were repeated references by the chemist to the expression 'Cannabis as defined in the DDA 1952' with no mention made at any time of the definition section in the Act, of cannabis, to wit, s 2, which at the material time, provided as follows: '"cannabis" means any part of any plant of the genus cannabis from which the resin has not been extracted, by whatever name it may be designated'.

The court formed the view that the glaring omission by the chemist to refer to s 2 of the Act could give rise to the inference that he did not have in mind the ingredients of cannabis as defined in the section and as explained in *PP v Alcontara* [1993] 3 MLJ 568 at p 577.

The court also found defects or infirmities in the chemist's testimony, where he made no mention of the results of his physical examination and whether he carried out any, and if so, what tests. In the result, the court concluded (at p 234):

> His testimony is open to the construction that the plant material examined by him was either 'cannabis' within the meaning of s 2 of the Act or that it was 'cannabis (Indian Hemp)' listed in Part III of the First Schedule of the Act, though nowhere defined in the Act.
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> We hasten to add that 'Indian Hemp' was defined in s 2 of the Dangerous Drugs Ordinance 1952, in the form that it took prior to its deletion by the Dangerous Drugs (Amendment) Act 1972, as follows:
>
> > 'The dried flowering or fruiting tops of the pistillate plant Cannabis Sativa L, from which the resin has not been extracted, under whatever name they may be designated in commerce.'
>
> which definition, as explained by Rigby J (as he then was) in *Teoh Soo Tok v PP* [1961] MLJ 74, still affords useful guidance, as to what constitutes 'cannabis (Indian Hemp)'.
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> On the other hand, as we have said, 'cannabis' has been defined in s 2 of the Act and later amended by Act A834, Dangerous Drugs (Amendment) Act 1992, to read:
>
> > '... any part of any plant of the genus cannabis from which there is found to be present resin irrespective of its quantity, and by whatever name the plant may be designated'
>
> as explained in *Alcontara*'s case.

The court found in the context of the relevant legislation that 'cannabis' and 'cannabis (Indian Hemp)' even though of the same weight may not be the

same thing, as they may constitute the subject matter of different offences which may be differently penalised. Hence, the court was therefore left in doubt as to whether the accused had committed an offence in a lower or higher degree of seriousness, the latter being trafficking in dangerous drugs. After taking into account the familiar canon of construction that where two views can reasonably be entertained regarding the meaning and effect of provisions in a highly penal statute that in favour of the accused should be adopted and where a finding in a higher degree would mean a mandatory death sentence, the court accordingly quashed the conviction for trafficking and set aside the death sentence, and substituted thereof a conviction under s 12(2) of the Act and sentenced the accused to five years' imprisonment to take effect from date of arrest.

Our primary consideration in this appeal is the ratio decidendi in *Shukri* that the omission by the chemist to mention 'cannabis as defined in s 2 of the Dangerous Drugs Act 1952' in his testimony or report has created a doubt in the prosecution case as it could give rise to the inference that the plant material could either be 'cannabis' within the meaning of s 2 of the Act, or 'cannabis (Indian Hemp)' listed in Part III of the First Schedule of the Act, though nowhere defined in the Act.

In *Mohd Yusof bin Said v PP* [1996] 1 MLJ 640, the evidence of the chemist PW1 was that the dry plant material which he examined had characteristic features similar to that of cannabis. He also took representative samples of the plant material and carried out a microscopic examination and the two chemical tests which confirmed that it was cannabis. He concluded that by 'cannabis' he meant 'cannabis as defined under Dangerous Drugs Act 1952' without specifying the words 's 2'.

On appeal, it was the submission of counsel that as the chemist, PW1 had failed to testify that the impugned drug was 'cannabis' as defined under s 2 of the Act, this court of three judges should adopt the decision in *Shukri*, and substitute the conviction under s 12 (2) of the Act. The court, however, distinguished *Shukri* where on the facts, it found that the chemist's evidence did not suffer from the defects or infirmities as in *Shukri* and accordingly dismissed the appeal.

The court further held (per Dzaiddin FCJ) at p 647:

> In fact, the issue before us is whether it is fatal to omit the words 's 2', and our answer is that it depends on the evidence of the chemist in each particular case. If the testimony of the expert witness satisfied the essential ingredients in the statutory definition of 'cannabis', then mere omission to mention the section would not be material, and should not affect his expert opinion. Of course, to avoid similar difficulty in future, it would have been better for the chemist to state: 'cannabis as defined in s 2 DDA 1952'.

In *Abdullah bin Yaacob v PP* [1991] 2 MLJ 237, a similar point arose from the decision of the Supreme Court. The evidence of the chemist was that the substance he had examined were ganja but did not say that they were ganja as defined in s 2 of the Dangerous Drugs Act 1952.

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court) found as follows (pp 238–239):

According to his evidence the chemist (PW1) had examined the 1,001 rolls and had said that all of them were 'vegetable matter' and he had used the words 'vegetable matter' not less than nine times. See pp 2–3 of the record of appeal and this officer (PW1) had used the word 'cannabis' only once and made no reference of the exhibit in relation to s 2 of the Dangerous Drugs Act 1952. Counsel had stressed that the report of the chemist could not be accepted as corroborative evidence to the evidence of PW1 because the chemist did not say in his evidence that the ganja was ganja as defined under the Dangerous Drugs Act 1952.

It is certainly true that there is a difference between the drug heroin and the drug ganja or cannabis under the Dangerous Drugs Act 1952. After the amendment to the First Schedule of the Act in 1971, the difference between the two kinds of drugs becomes more obvious and now the drug heroin has become one of the dangerous drugs in the First Schedule but ganja or cannabis still has its own definition. See *PP v Ong Tee*. Therefore it is not sufficient if there is only the evidence of the chemist that the thing is ganja but there must be evidence confirming that it is ganja as defined under the Dangerous Drugs Act 1952.

Looking at the report of the chemist in this case, it is found that he had certified in his report dated 2 November 1983 that the cannabis was as defined in the Dangerous Drugs (Amendment) Act 1980. See p 63 of the record of appeal. There is no doubt raised whatever that the exhibit examined and analyzed by the chemist (PW1) was ganja according to the requirement of the 1952 Act. This is based on the evidence of the chemist himself. It should certainly be held that the ganja stated by PW1 in his oral evidence must have the same meaning as given in his report before he gave the evidence. Therefore we rejected the argument of the counsel in this issue.

See also the Court of Appeal judgment in *Abdul Karim bin Pak Kub & Anor v PP* [1997] 2 MLJ 112.

Based on the above authorities, we are unanimously of the view that so long as the chemist testifies or certifies to the effect that the plant material which he analysed contained the ingredients of cannabis under the Act, it does not matter whether or not he mentions the words 's 2' of the Act. Therefore, when the chemist says that cannabis as defined in the Act based on the result of his analysis he must have in mind only cannabis as defined in 's 2' since cannabis (Indian Hemp) is nowhere defined in the Act. In short, it depends on the evidence of the chemist in each particular case. We agree with the reasoning in *Mohd Yusof bin Said* that if the testimony of the chemist satisfied the essential ingredients of the statutory definition of 'cannabis' under the Act, then mere omission to mention the words 's 2' would not be material and should not affect his expert opinion.

On the third and final ground of appeal, we need only say that we agree entirely with the opinion expressed by the Supreme Court in *Mohamad Radhi bin Yaakob*, at pp 171–172:

Whilst we could not disagree with what the learned judge had said earlier in his judgment that if the defence had succeeded in rebutting the presumption of possession under s 37(d), there was no need to rebut the presumption of trafficking under s 37(da), it did not follow that the presumption of trafficking would become irrebuttable merely because the defence had failed to rebut the

presumption of possession. *In our opinion unless the evidence in a particular case does not obviously so warrant, it is incumbent for the court to consider whether on the balance of probabilities, the evidence of the defence has rebutted the statutory presumption of trafficking under s 37(da) as a separate exercise even though the court is satisfied on balance that the presumption of possession under s 37(d) has not been rebutted.* (Emphasis added.)

In the present appeal, we had earlier found that the trial judge had failed to consider, as a separate exercise, whether on the evidence the appellant had succeeded on the balance of probabilities in rebutting the statutory presumption of trafficking under s 37(da) of the Act. We would reiterate that it was solely on this ground that we quashed the conviction for trafficking and substituted thereof one of possession. Accordingly, we allowed the appeal.

Appeal allowed.

Reported by Andrew Christopher Simon